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No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES CUNNINGHAM, JR.,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

RANDY HERTZ
704 5th Street, S.E.
Washington, D.C. 20003

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
New York University School of Law
New York, New York 10012

ATTORNEYS FOR PETITIONER

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York
10019

(212) 586-8397

ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether the procedures for selecting the grand jury and traverse jury violated the Sixth or Fourteenth Amendments by discriminating on the basis of race or sex?

2. Whether the denial of State-paid investigative services violated the Sixth Amendment or the due process or equal protection clauses of the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Questions Presented	i
Citation to Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
How the Federal Questions Were Raised and Decided Below	6
Reasons for Granting the Writ	8
I. The Court Should Grant Certiorari To Consider Whether the Procedures For Selecting the Grand Jury or Traverse Jury Violated the Sixth or Fourteenth Amendments by Discriminating on the Basis of Race or Sex	8
II. The Court Should Grant Certiorari To Consider Whether the Denial of State-paid Investigative Services Violated the Sixth Amendment or the Due Process or Equal Protection Clauses of the Fourteenth Amendment	12
Conclusion	15
Appendix A	

TABLE OF CASES

	Page
Alexander v. Louisiana, 405 U.S. 625 (1972)	9
Carter v. Jury Commission, 396 U.S. 320 (1970)	10
Castaneda v. Partida, 430 U.S. 482 (1977)	8,10,12
Coleman v. Alabama, 377 U.S. 129 (1964)	8
Duren v. Missouri, 439 U.S. 357 (1979)	9
Eubanks v. Louisiana, 356 U.S. 584 (1958)	10
Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975)	9
Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045 (5h Cir.), cert. denied, 439 U.S. 1119 (1978)	13
Green v. County School Board, 391 U.S. 430 (1968)	11
Hernandez v. Texas, 349 U.S. 475 (1954)	10
Lee v. Habib, 137 U.S. App. D.C. 403, 424 F.2d 891 (D.C. Cir. 1970)	13
Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)	13
Moore v. United States, 432 F.2d 730 (3d Cir. 1979) (en banc)	12
Rose v. Mitchell, 443 U.S. 545 (1979)	8,9
State v. Second Judicial District, 85 Nev. 241, 453 P.2d 421 (1969)	13
Swann v. Adams, 385 U.S. 440 (1967)	11
Taylor v. Louisiana, 419 U.S. 522 (1975)	9
Turner v. Fouche, 396 U.S. 346 (1970)	10
United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963)	13
Other Authorities:	
ABA Standards Relating to the Defense Function, Commentary	12,13
Kairys, Kadane & Lehoczky, "Jury Representativeness: A Mandate for Multiple Source Lists," 65 Calif. L. Rev. 776 (1977)	9,10
J. Van Dyke, JURY SELECTION PROCEDURES (1977)	10

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner James Cunningham, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at __ Ga. __, 284 S.E.2d 390 (1981), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 13, 1981. A timely petition for rehearing was denied on December 1, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner James Cunningham, Jr., was convicted and sentenced to death in October, 1979, for murdering William Crawford in the course of an armed robbery.

The State's evidence at trial consisted primarily of petitioner's confessions to the police. In his first and second confessions, petitioner admitted that: on January 1, 1979, he and his wife went to the house of William Crawford, which contained Mr. Crawford's small store and residence (T. 226-27, 273); after conversing briefly with Mr. Crawford, petitioner struck him nine times with a pipe wrench until Mr. Crawford was unconscious (T. 226, 273-74); petitioner then went into Mr. Crawford's bedroom, and took a pocketbook containing $ 3330.00. In his third confession, petitioner informed police officers of the location of his blood-stained clothing, the pipe wrench, and Mr. Crawford's wallet, and led the police to these items. (T. 275-76.) In his final con-

fession, petitioner stated that he and his wife had planned the robbery together, and that it was his wife who took the money from the bedroom (T. 284-85).

The medical examiner testified that Mr. Crawford died of brain damage, inflicted by multiple blows to the head with a heavy metal object. (T. 150.) The State's other witnesses provided circumstantial evidence tending to link petitioner to the killing. Witnesses testified that petitioner and his wife were walking in the direction of Mr. Crawford's house shortly before the killing occurred (T. 176, 182). Acquaintances of the petitioner testified that he sought to borrow money shortly before the night of the killing (T. 171-72, 290-91), while other witnesses told of the petitioner's possessing a substantial amount of money after the time of the offense (T. 193, 198). Finally, witnesses testified that petitioner and his entire family left Georgia after the killing and went to New Jersey. (T. 189-90, 196-97, 200-01.)

During the sentencing hearing, the defense's presentation of mitigating evidence included testimony by petitioner's mother that he had never before been involved in any type of trouble (T. 380), and testimony by two former employers that petitioner had demonstrated trustworthiness during his employment (T. 374-75, 377, 383). The petitioner himself took the stand and told the jury that: he and his wife had not gone to the house with any plans to kill Mr. Crawford, and he had not intended to kill the deceased (T. 391-94); they had been driven to commit the robbery by their desperate need for money to prevent their losing their mortgaged trailer home (T. 387, 389); and he was drunk at the time of the killing, and was not fully aware of his actions (T. 388, 392).

Prior to the trial in this case, petitioner's counsel filed a "Motion to Quash Indictment Because Grand Jury

Unlawfully Composed" (R. 53), and a "Challenge to Array of Traverse Jury" (R. 60). Both pleadings challenged the local jury selection procedures as unconstitutionally discriminatory on the basis of race and sex. In a pretrial evidentiary hearing, petitioner presented the following statistics on the population of Lincoln County, Georgia, and the degree of under-representation of Black people and women on the grand jury and traverse jury:

(1) General population statistics for Lincoln County:

(a) Racial breakdown:
Black -- 46.12 %
White -- 53.79 %
(b) Composition by sex:
Women -- 50.86 %
Men -- 49.14 %

(T. 18, 32.)

(2) Statistics concerning Grand Jury representation:

(a) Proportionate representation:
Blacks -- 28.67 %
Whites -- 76.30 %
Women -- 34.27 %
Men -- 65.03 %

(b) Degree of under-representation:
Under-representation of Blacks -- 37.84 %
Under-representation of women -- 32.62 %

(T. 33-34.)

(3) Statistics concerning Traverse Jury representation:

(a) Proportionate representation:
Blacks -- 29.60 %
Whites -- 70.86 %
Women -- 34.03 %
Men -- 66.43 %

(b) Degree of under-representation:
Under-representation of Blacks -- 35.82 %
Under-representation of women -- 33.09 %

(T. 33-34.) In the evidentiary hearing, a jury commissioner for Lincoln County testified that in his opinion, there were sufficient qualified Black jurors and female jurors in the county to make up grand and traverse juries that were proportionately representative of these groups. T. 24-26. The

parties stipulated that three other jury commissioners would have expressed the same opinion if they had taken the stand. T. 29. In rebuttal to the petitioner's presentation, the State elicited testimony from a jury commissioner that jury selection was conducted in accordance with a 1973 federal court order requiring that the commissioners select every fifth name from the voter registration list for the traverse jury list, and select every third name from the voter list for the grand jury list. T. 27. After hearing the evidence, the trial court denied petitioner's claims, on the grounds that the jury commissioners' compliance with the federal court order established the lack of any discrimination, and that moreover, "this Court is at the present time without any power or authority to set aside the Federal court order." T. 36.

Prior to trial, petitioner's counsel sought court-ordered funding to retain an investigator. Counsel filed an Affidavit of Poverty (R. 23), and a "Motion for Funds to Hire An Investigator to Aid in the Preparation of Defendant's Defense," requesting $ 1,000 - $ 3,000 for investigative assistance. R. 35. In the motion, counsel stated that there were several witnesses who needed to be interviewed, including witnesses who were "located in widely disparate areas of the State and North Carolina." R. 36. Counsel further stated that petitioner lacked the finances to privately retain an investigator to interview these witnesses, and that counsel could not perform the task because he lacked the expertise and because he could not take time away from preparing the legal aspects of the case. Id. The trial court summarily denied petitioner's request. R. 46.

At the conclusion of the sentencing hearing, the court instructed the jury to determine whether to impose a sentence of life imprisonment or death on each of the two counts

charged - armed robbery and murder. T. 426-27. The judge then instructed the jury to determine the applicability of the following two aggravating circumstances:

> (1) The offense of murder and/or armed robbery and/or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, (2) The offense of murder and/or armed robbery and/or kidnapping was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim.

T. 428. The jury found that both of these aggravating circumstances were present (T. 432), and returned sentences of death on both the count of armed robbery and the count of murder. T. 432-33.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to trial, petitioner filed a "Motion to Quash Indictment Because Grand Jury Unlawfully Composed" (R. 53) and a "Challenge to Array of Traverse Jury" (R. 60). In each of these motions, petitioner argued that the local jury selection procedures discriminated on the basis of race and sex, in violation of the Sixth Amendment and the due process and equal protection clauses of the Fourteenth Amendment. R. 55, 62. After a pre-trial evidentiary hearing on these issues, the trial court denied the motions, ruling that the jury selection procedures could not be deemed discriminatory in that they complied with a 1973 federal court order establishing random selection procedures for the county. Id.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of these motions violated his Sixth and Fourteenth Amendment rights. Brief of Appellant, at 11-12. The Georgia Supreme Court rejected this claim, ruling that the petitioner's showing was insufficient to make out a prima facie case of discrimination in that petitioner had not shown that "the source was tainted" and that opportunity for discrimination existed from the source. Cunningham v.

State, ___ Ga. ___, 284 S.E.2d 390, 393. The state supreme court further denied the motion to quash the indictment on the procedural ground that the petitioner had not complied with the local requirement that such motions be filed prior to indictment. Id. at 392.

2. Petitioner filed a pre-trial "Motion for Funds to Hire an Investigator to Aid in the Preparation of Defendant's Defense." R. 35. In the motion, petitioner explained that the assistance of an investigator was required, because there were several witnesses who needed to be interviewed, including out-of-state witnesses. R. 36. Petitioner stated in the motion that he lacked the finances to privately retain an investigator (id.), and petitioner also filed a separate Affidavit of Poverty (R. 23). The trial court denied the motion in a summary order. R. 46.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of investigative assistance violated due process and equal protection. Brief of Appellant, at 30-31. The Georgia Supreme Court rejected this claim, holding that:

> the grant or denial of a motion for funds to employ an investigator lies within the sound discretion of the trial judge and will not be overturned unless an abuse of discretion is shown . . . . The case against the defendant was factually simple and did not depend on a large volume of evidence of a technical nature. We find no abuse of discretion in the trial court's denial of the motion for funds to hire an investigator.

Cunningham v. State, supra, 284 S.E.2d at 393.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES FOR SELECTING THE GRAND JURY OR TRAVERSE JURY VIOLATED THE SIXTH OR FOURTEENTH AMENDMENTS BY DISCRIMINATING ON THE BASIS OF RACE OR SEX

The substantial under-representation of Blacks and women in the grand jury and traverse jury violated the Sixth Amendment fair cross-section requirement and the Fourteenth Amendment guarantee of equal protection.[1/] Under this Court's well-established standards for assessing discrimination in jury selection,

> The first step is to establish that the [under-represented] group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or applied.... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.... Finally, ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda v. Partida, 430 U.S. 482, 494 (1977); Rose v.

1/ In rejecting petitioner's challenge to the composition of the grand jury, the Supreme Court of Georgia both denied the claim on the merits, and invoked the procedural ground that the petitioner had failed to comply with a local rule requiring that such challenges to grand jury composition be filed prior to indictment. Cunningham v. State, supra, 284 S.E.2d at 392-93. However, despite the lower court's invocation of this procedural ground, this Court is still free to review the merits of the grand jury claim. When the state courts consider the merits of a claim despite the existence of a procedural bar, then this Court is similarly free to examine the substantive merits of the claim. Castaneda v. Partida, 430 U.S. 482, 485 n. 4 (1977); Coleman v. Alabama, 377 U.S. 129 (1964). In the present case, the trial court considered the grand jury composition claim on the merits (T. 35-36), and indeed permitted a full evidentiary hearing on the claim. The prosecuting attorney at trial did not in any way raise the procedural objection, and the trial judge did not invoke the procedural bar. Although the Georgia Supreme Court cited the procedural rule, it went on to consider the grand jury claim on the merits. See Cunningham v. State, supra, 284 S.E.2d at 392-93.

Mitchell, 443 U.S. 545, 565-66 (1979). The first criterion is clearly satisfied in the present case: "Negroes . . . are members of a distinct class capable of being singled out for different treatment under the laws" (Rose v. Mitchell, supra, 443 U.S. at 565), as are women (Duren v. Missouri, 439 U.S. 357, 363 (1979); Taylor v. Louisiana, 419 U.S. 522, 531 (1975)).

In applying the second criterion, the most commonly employed and reliable test of under-representation is the comparative disparity standard, which measures the percentage by which the probability of serving is reduced for members of the cognizable class. See, e.g., Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972); Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975); Kairys, Kadane & Lehoczky, "Jury Representativeness: A Mandate for Multiple Source Lists," 65 Calif. L. Rev. 776, 790-91, 7973-99 (1977). Under this test, the percentage of under-representation is analyzed with the following calculation:

$$\frac{\text{Proportion of the population that is in cognizable class} - \text{Proportion of source or pool that is in cognizable class}}{\text{Proportion of population in class}} \times 100$$

Incorporating the statistics developed at the trial level, one derives the following figures:

Grand Jury	Traverse Jury
(1) Under-representation of Blacks:	(1) Under-representation of Blacks:
$\frac{46.12 - 28.67}{46.12} \times 100 = 37.84\ \%$	$\frac{46.12 - 29.60}{46.12} \times 100 = 35.82\ \%$
(2) Under-representation of women:	(2) Under-representation of women:
$\frac{50.86 - 34.27}{50.86} \times 100 = 32.62\ \%$	$\frac{50.86 - 34.03}{50.86} \times 100 = 33.09\ \%$

In prior decisions, this Court has indicated that prima facie cases were established upon showing disparities of 23 % (Turner

v. Fouche, 396 U.S. 346 (1970), 33 % (Carter v. Jury Commission, 396 U.S. 320 (1970), 25 % and 33 % (Eubanks v. Louisiana, 356 U.S. 584 (1958)), and 14 % (Hernandez v. Texas, 349 U.S. 475 (1954)). Commentators have suggested, on the basis of caselaw and Civil Rights Commission standards, that any disparities exceeding 15 - 20 % require governmental rebuttal and justification. See J. Van Dyke, Jury Selection Procedures 98 (1977); Kairys, Kadane & Lehoczky, supra at 799 & n.24.

Accordingly, the under-representation statistics in this case were sufficient to establish a prima facie case of discrimination in violation of the Sixth and Fourteenth Amendments. In ruling that a prima facie case had not been shown, the Georgia Supreme Court stated that "[t]here was no evidence that the source was tainted in that there was no showing that an opportunity for discrimination existed from the source of the jury list." Cunningham v. State, supra at 393. But, as this Court has made clear, statistical disparity alone is sufficient to make out a prima facie case, and the challenger of the jury system is not required to show opportunity for discrimination in the source list. Castaneda v. Partida, supra, 430 U.S. at 494-95 ("a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing," but statistical showing is sufficient: "Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discrimination...").

Since a prima facie case of discriminatory jury selection had been established, the burden fell upon the State to rebut the prima facie case. In rebuttal, the State showed that the current selection procedures conform to a 1973 federal district court order establishing certain random selection criteria. The State maintained that since the federal court adopted this

procedure to attempt to ensure impartial jury selection, and since the currently employed procedures comply with the federal court order, the procedures therefore do not infringe upon the defendant's Sixth and Fourteenth Amendment rights. The flaw in this logic is readily apparent. Although the 1973 court order was intended to establish impartial jury selection processes in Lincoln County, the empirical evidence has now shown that the procedure does not satisfy that goal. Even a procedure which was originally designed to protect a constitutional right must be abandoned when it is demonstrated that the procedure violates the very constitutional right it was supposed to protect. Cf. Swann v. Adams, 385 U.S. 440 (1967) (invalidating apportionment plan constructed to effectuate the constitutional mandate of one-person-one-vote, because the apportionment plan produced unconstitutional inequalities); Green v. County School Board, 391 U.S. 430 (1968) (striking down local procedure for implementing Brown v. Board of Education because empirical evidence demonstrated that the procedure failed to produce the requisite goal of a nondiscriminatory school system).[2/]

2/ The trial court in this case rejected petitioner's challenge to the selection procedures in part because it concluded that it was "at the present time without any power or authority to set aside the Federal court order that pertains to this county on composition." T. 36. The Georgia Supreme Court did not rely on this principle of deference, apparently because, as the state supreme court's opinion recognizes, the federal court order expressly provided for a means by which the county jury comissioners could modify the selection procedures. Cunningham v. State, supra, 284 S.E.2d at 393. See Order, Twilight Improvement Ass'n v. Jury Com'n of Lincoln County, C.A. 1658 (S.D. Ga., January 8, 1973) (Alaimo, J.) ("Prior to any change in the procedures set forth in paragraph 2 of this order, the Jury Commissioners shall give notice of same to the Judge of the United States District Court for the Southern District of Georgia and to all counsel of record for plaintiff.") R. 58-59. In any event, even if the federal court decision had precluded action by the state courts, obviously this Court has the power to rectify the inequalities created by the selection procedures.

Thus, petitioner's prima facie case of discrimination was not rebutted, and the jury selection procedures accordingly must be struck down as violative of the Sixth and Fourteenth Amendments. Castaneda v. Partida, supra, 430 U.S. at 499. This Court should grant certiorari to ensure that capital convictions are not secured through unconstitutional jury selection procedures.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF STATE-PAID INVESTIGATIVE SERVICES VIOLATED THE SIXTH AMENDMENT OR THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Thorough and extensive factual investigation is critical to the presentation of an adequate defense at trial. It has been widely recognized that:

> [R]epresentation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance.

Moore v. United States, 432 F.2d 730, 739 (3rd Cir. 1979)(en banc). The American Bar Association's standards for defense counsel expressly recognize a "duty to investigate" because

> it is axiomatic among trial lawyers and judges that cases are not won in the courtroom but by the long hours of laborious investigation and careful preparation and study of legal points which precede the trial. In our system of justice a trial is not an inquiry to expose previously unknown facts. . . . Investigation and preparation are the keys to effective representation .... It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice.

ABA Standards Relating to the Defense Function, Commentary,

at 224-25; see id., Standard § 4.1 (Duty to Investigate).

Although this Court has not as yet ruled on the question of an indigent defendant's constitutional right to State-paid investigative assistance, several lower courts have concluded that indigent defendants are entitled to such services under the equal protection clause of the Fourteenth Amendment, or in order to satisfy the Fourteenth Amendment's requirement of fundamental fairness and the Sixth Amendment's requirement of effective assistance of counsel. See Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)(Sixth and Fourteenth Amendment right to effective assistance of counsel encompasses right to State-paid investigative services); Lee v. Habib, 137 U.S. App. D.C. 403, 411, 424 F.2d 891, 899 (1970)(Wright, J.)(equal protection); United States v. Germany, 32 F.R.D. 421, 423-24 (M.D. Ala. 1963)(Johnson, J.)(effective assistance of counsel); State v. Second Judicial District, 85 Nev. 241, 453 P.2d 421 (1969)(equal protection); cf. Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045, 1054-55 (5th Cir.), cert. denied, 439 U.S. 1119 (1978)(constitutional right to access to the courts confers entitlement to State-paid investigative services in habeas corpus proceedings).

In the present case, defense counsel sought investigative resources on behalf of his indigent client, in order to prepare for trial, and particularly, in order to interview witnesses, some of whom were "located in widely disparate areas of [the] State and North Carolina." Motion for Funds to Hire an Investigator, R. 35, 36. In rejecting petitioner's claim that he was constitutionally entitled to such assistance, the Georgia Supreme Court stated that the trial judge's denial of funding was not an abuse of discretion because: "The case against the defendant was factually simple and did not depend on a large

volume of evidence of a technical nature." Cunningham v. State, supra, 284 S.E.2d at 393. Although the transcript does indeed reflect a very brief and simple trial, the inadequacy of the defense's attack upon Government witnesses and the paucity of defense evidence may well have been due to the absence of adequate defense investigation of this case.

Indeed, the record reflects several ways in which proper investigation could have aided the defense. The State's case rested almost exclusively on the confessions of petitioner, and investigation would have greatly enhanced the defense's chances of suppressing these confessions. An investigator conceivably could have found guards or other prisoners from the North Carolina jail to support the defense's allegation that at the time of the first confession, petitioner was suffering from lack of sleep and was in such a poor physical and mental condition as to render the confession unconstitutionally involuntary. An investigator also might have been able to provide evidentiary support for defense counsel's allegations that the third confession was unconstitutionally coerced through police officers' deliberate misrepresentations, and that all of the confessions had been unconstitutionally obtained in violation of petitioner's Sixth Amendment right to the presence of already appointed counsel. Moreover, an investigator could have interviewed the various police officers involved in taking the confessions, and provided impeachment material to use in attempting to suppress the confessions on grounds of failure to comply with Miranda requirements.

Furthermore, investigative assistance could have substantially bolstered the defense's other legal challenges. For example, an investigator could have helped amass more substantial factual bases for the attack upon the discriminatory jury

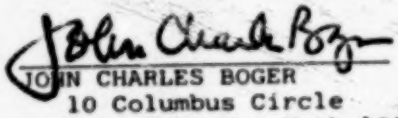
selection procedures (R. 53, 60), and for the request for change of venue on grounds of prejudicial pre-trial publicity (R. 16). An investigator also could have aided in preparing for the capital sentencing hearing, by seeking additional mitigating witnesses, and by supplying the statistical and factual bases for an argument on proportionality.

Accordingly, the record demonstrates several ways in which adequate investigative resources could have substantially improved the efficacy of defense counsel. This Court should grant certiorari to determine whether the trial court's denial of such resources deprived petitioner of equal protection and effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ATTORNEY OF RECORD

RANDY HERTZ
704 5th Street S.E.
Washington, D.C. 20003

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
New York University School of Law
New York, New York 10012

ATTORNEYS FOR PETITIONER

Dated: New York, New York
January 29, 1982